BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TONY L. ELLIOTT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,023,443
J & J DRAINAGE PRODUCTS COMPANY	)	and 1,028,411
Respondent	)	
AND	)	
	)	
ACCIDENT FUND INSURANCE COMPANY	)	
OF AMERICA and CONTINENTAL WESTERN	)	
INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant appeals the August 25, 2006 preliminary hearing Order of Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant, in his application to the Workers Compensation Board (Board), raises the following issues:

> Accidental injury, whether the injuries arose out of and in the course of the employees *[sic]* employment, temporary total disability, nature and extent, change of physician, and medical treatment.[1]

Additionally, in his brief to the Board, claimant raises the issue of timely notice. However, respondent, at the preliminary hearing,[2] admitted that timely notice of accident

[1] Application For Review By Kansas Workers Compensation Board at 1.

[2] The preliminary hearing held on August 3, 2006.

for the May 18, 2005 accident (Docket No. 1,023,443) and for the March 2, 2006 accident (Docket No. 1,028,411) was provided.[3]

Also, at the preliminary hearing, respondent admitted that claimant suffered the accidental injury on May 18, 2005, and admitted that the incident described by claimant on March 2, 2006, occurred as described by claimant. Respondent denied any "injury" resulted from the March 2, 2006 incident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the undersigned Board Member finds the Order of the Administrative Law Judge (ALJ) should be affirmed.

Claimant, a machine operator for respondent, alleges injuries while working with respondent on May 18, 2005, and March 2, 2006. After the May 18, 2005 injury, claimant was provided authorized medical care, beginning with respondent's company doctor, Christopher P. Rodgers, M.D. Claimant later came under the care of orthopedic surgeon John P. Estivo, D.O. The initial injuries involved claimant's left upper extremity, including his shoulder and neck. Claimant underwent x-rays of the left shoulder and neck, MRIs of the left shoulder and neck and an arthrogram of the left shoulder. All tests were normal with the exception of mild degenerative changes at the glenohumeral articulation and the humeral head in the left shoulder. Dr. Estivo diagnosed a strain of the left shoulder.

Claimant was found to be at maximum medical improvement on November 21, 2005, and returned to his regular job with respondent. Dr. Estivo again examined claimant on December 12, 2005, at which time he found claimant's condition to be unchanged. Claimant's range of motion was normal. Dr. Estivo did note a restriction in claimant's movements when range of motion was tested, but noted that when claimant removed his sweatshirt, which required he raise both arms over his head, he did so without apparent problem.

Claimant continued to express difficulties and was referred by the ALJ for an independent medical examination to orthopedic surgeon J. Mark Melhorn, M.D., on February 14, 2006. As a result of that examination, Dr. Melhorn diagnosed a painful left shoulder and suggested a 3-phase bone scan. The bone scan was performed, and was reported as normal. Dr. Melhorn's office was contacted by claimant on March 9, 2006, regarding a new injury suffered by claimant, and advised claimant was requesting a new examination.

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[3] P.H. Trans. (Aug. 3, 2006) at 7 and 10.

Claimant testified that on March 2, 2006, a forklift ran over an air hose claimant was using. The forklift became entangled in the hose, jerking it away from claimant. The hose pinned him against a machine. Claimant alleges his previous left shoulder injury was aggravated and his right upper extremity, including the shoulder, was injured as a result of this incident. An accident report prepared by claimant on March 7, 2006, indicates he suffered injury to his left shoulder and right hand as a result of the hose incident.[4] Two of respondent's representatives, Shelby Franz (lead man) and David Diasio (plant superintendent), testified regarding the incident. Both admitted the accident with the air hose occurred and that they were aware of the incident on the date in question. Mr. Diasio stated that claimant refused any medical treatment after the incident.

Claimant was seen by Dr. Melhorn on March 22, 2006, at which time claimant described an injury suffered when he was bumped into a machine, injuring the left shoulder. No mention is made of the right shoulder in the March 22, 2006 report. A pain drawing completed by claimant on March 22, 2006, displays problems in the left upper extremity and neck, but nothing on the right side. Claimant returned to Dr. Melhorn on April 6, 2006, with continued complaints in the left upper extremity, including the shoulder. Another pain drawing completed on that date is again confined to the left upper extremity, hand and neck, with nothing indicated on the right side. The ALJ, at the preliminary hearing, asked claimant to explain the lack of right side involvement on the pain drawings. Claimant was unable to provide any explanation for the lack of right upper extremity displays on the pain drawings.

Claimant's wife, Bambi Elliott, testified on August 16, 2006. Mrs. Elliott explained that at the February 14, 2006 visit, claimant had inadvertently marked the right side of the pain drawing. Claimant then placed an arrow on the drawing, indicating the symptoms were actually on the left side. At the March 22, 2006 examination, when claimant marked the pain drawing with symptoms on the right side, Dr. Melhorn said that he had again marked the wrong side. According to Mrs. Elliott, Dr. Melhorn then took the pain drawing away from claimant and threw it away. As noted above, when claimant was asked at the preliminary hearing, by the ALJ, why the pain drawings of March 22 and April 6, 2006, did not indicate symptoms on the right side, claimant had no explanation.

In workers compensation litigation, it is the claimant's burden to prove his/her entitlement to benefits by a preponderance of the credible evidence.[5]

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[4] *Id*., Cl. Ex. 1.

[5] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[7]

Claimant has appealed regarding claimant's entitlement to temporary total disability, change of physician and ongoing medical treatment.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[8]

Claimant's entitlement to temporary total disability, change of physician and ongoing medical treatment are not issues over which the Board takes jurisdiction from an appeal of a preliminary hearing order. Claimant's appeal of these issues is dismissed.

Claimant is also appealing the nature and extent of his disability. This issue will ultimately be determined by the ALJ at the time of the regular hearing. For the Board to attempt to so determine at this time would be premature. Claimant's appeal of this issue is also dismissed.

With regard to whether claimant suffered accidental injury arising out of and in the course of his employment with respondent, respondent has stipulated to this issue from the May 18, 2005 injury. Therefore, there is no dispute for the Board to determine with

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[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[8] K.S.A. 44-534a(a)(2).

regard to this issue and this date of accident. With regard to the accident on March 2, 2006, respondent has stipulated that the incident occurred as described by claimant. The dispute revolves around whether claimant suffered any injury from that incident. The ALJ, in the Order, found:

> Claimant has also failed to establish any work-related injury to his right shoulder or right arm, at any time, from any accident.[9]

After reviewing the medical records and the DVD of claimant's activities in his yard, this Board Member agrees with the ALJ's assessment. Claimant has failed, based upon this record, to show any right upper extremity involvement with these alleged injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bruce E. Moore dated August 25, 2006, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2006.

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier Accident Fund Insurance Company of America
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier Continental Western Insurance Company
Bruce E. Moore, Administrative Law Judge

[9] Preliminary hearing Order (Aug. 25, 2006) at 1.

[10] K.S.A. 44-534a.